



April 9, 2002

Ms. Kay Molina  
Legal Services Division  
Texas General Land Office  
1700 North Congress Avenue  
Austin, Texas 78701-1495

OR2002-1763

Dear Ms. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160975.

The Texas General Land Office (the "office") received two requests for information regarding efforts by Surfside Mayor Larry Davison to build a home at 207/210 Beach Drive. You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

At the outset, we note that Tab 3 includes documents that are indicated to have been filed with a court, and thus appear to constitute information that is also contained in a public court record. *See* Gov't Code § 552.022(a)(17). Therefore, as prescribed by section 552.022, these public court documents must be released to the requestor unless they are confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Therefore, to the extent any of the information in Tab 3 is also contained in a public court record, it is not excepted from required disclosure and must be made available to the requestor.

We will now address the applicability of your claimed exceptions to the remaining submitted information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that, prior to the office's receipt of the present requests, the Office of the Attorney General filed suit against Larry Davison on behalf of the office. Thus, the office was involved in pending litigation in *State of Texas v. Larry Davison*, Cause No. GV-200024, on the date it received the present requests for information. You further explain that the subject matter of the pending litigation involves Mr. Davison's construction of a house at 207 Beach Drive, Surfside, Texas. Accordingly, we also find that the remaining submitted information is related to the pending litigation for purposes of section 552.103(a). Thus, the office may withhold much of the remaining information under section 552.103 of the Government Code.

We note, however, that the opposing party, in his capacity as an applicant for a building permit, has had access to some of the submitted information. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the office may not withhold this information under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

As you claim no other exception as to the information in Tab 2 that may not be withheld under section 552.103, such information must be released. You assert, however, that the information in Tab 3 that may not be withheld under section 552.103 is excepted under sections 552.107(1) and 552.111 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) protects an attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal services to the governmental body. Open Records Decision No. 574 at 5 (1990). As the opposing party, in his capacity as an applicant for a building permit, has had access to the documents at issue, they are not privileged attorney-client communications that may be withheld under section 552.107.

A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of sections 552.103 and 552.111. Open Records Decision No. 647 at 5 (1996)(citing *National Union Fire Insurance Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes). We note, however, that the present requests do not seek an attorney's entire litigation file. Further, as the opposing party, in his capacity as an applicant for a building permit, has had access to the documents at issue, the office may not withhold them as attorney work product under section 552.111. Accordingly, the documents in Tab 3 to which the opposing party has had access must be released to the requestor.

To summarize: (1) the office must release the court filed documents in Tab 3; (2) the office must release the documents to which the opposing party, in his capacity as an applicant for a building permit, has had access; and (3) the office may withhold the remaining submitted information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 160975

Enc: Submitted documents

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